

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

IN RE:

ACEY L. STINSON &
WENDY S. STINSON,

Debtors.

CASE NO.: 18-40628-KKS
CHAPTER: 7

PETER JONSSON,

ADV. NO. 19-04006-KKS

Plaintiff,

v.

ACEY L. STINSON,

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS
COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT,
OR IN THE ALTERNATIVE MOTION FOR MORE DEFINITE
STATEMENT (DOC. 17)**

This MATTER came before the Court on *Defendant's Motion to Dismiss Complaint to Determine Dischargeability of Debt, or in the Alternative Motion for More Definite Statement* ("Motion," Doc. 17), to which Plaintiff filed a response.¹ Having reviewed the pleadings, relevant

¹ *Response In Opposition to Motion to Dismiss* ("Response"). Doc. 19.

case law, and applicable Bankruptcy Code and Rules, the Motion is due to be granted, with leave for Plaintiff to amend.

BACKGROUND

On March 8, 2019, Plaintiff, Peter Jonsson, commenced this Adversary Proceeding by filing a four-count Complaint, seeking a determination that debt Defendant, Acey L. Stinson, allegedly owes is non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(4).² Defendant moves to dismiss the Complaint or, in the alternative, for a more definite statement.

Motion to Dismiss Standard

In addressing a motion to dismiss, the Court must accept the factual allegations in a complaint as true, and take them in the light most favorable to the Plaintiff.³ To survive a motion to dismiss, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁴ This standard “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of

² *Complaint to Determine Dischargeability of Debt* (“Complaint”). Doc. 1.

³ *Erickson v. Pardus*, 551 U.S. 89 (2007).

⁴ Fed. R. Civ. P. 8(a)(2), made applicable by Fed. R. Bankr. P. 7008.

action will not do.”⁵ Further “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”⁶ Thus, the Court engages in a two-step approach: “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”⁷

Shotgun Pleading

Rule 10(b) of the Federal Rules of Civil Procedure requires a party to “state its claim or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances.”⁸ “The ‘failure to identify claims with sufficient clarity to enable the defendant to frame a responsive pleading’ is a ‘shotgun pleading’ which places an unfair burden on defendants.”⁹ Shotgun pleadings are those from which “it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief.”¹⁰

⁵ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted).

⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

⁷ *Id.* at 679.

⁸ Fed. R. Civ. P. 10(b) is made applicable by Fed. R. Bankr. P. 7010.

⁹ *In re Mirabilis Ventures, Inc.*, 2009 WL 2589110, *1, *2 (Bankr. M.D. Fla. 2009).

¹⁰ *Anderson v. District Bd. Of Trustees of Cent. Florida Community College*, 77 F.3d 364, 365 (11th Cir. 1996).

Each Count of the Complaint incorporates all paragraphs set forth in the “General Allegations” section, without distinguishing those that are relevant to the cause of action pled. For that reason alone, the Motion is due to be granted.

Alter Ego

Although Plaintiff generally asserts that a separate entity, Real Estate Management and Consulting Company, LLC (“REMACC”), is a mere instrumentality or alter ego of Defendant, Plaintiff does not allege the elements of a cause of action for alter ego or to pierce the corporate veil. Further, attached to the Complaint as exhibits are copies of two (2) agreements, both of which name REMACC as Broker and Plaintiff as Owner and Seller, respectively.¹¹ Neither document appears to mention Defendant, in his individual capacity. To make a finding of alter ego and pierce the corporate veil in Florida,

Plaintiffs have the heavy burden to prove by a preponderance of the evidence that: 1) the shareholder dominated and controlled the corporation to such an extent that the corporation’s independent existence was in fact non-existent and the shareholder was in fact the alter ego of the corporation; 2) the corporate

¹¹ *Exclusive Property Management Agreement* and a *Listing Agreement for Exclusive Rights of Sale*, collectively the “Agreements.” Docs. 1-1 & 1-2.

form must have been used fraudulently or for an improper purpose; and 3) the fraudulent or improper use of the corporate form caused injury to the claimant.”¹²

Plaintiff cannot meet this burden based on the Complaint as it is currently drafted because the material allegations that might give rise to a conclusion that REMACC is the Defendant’s alter ego are missing.

Count I – Objection to dischargeability under 11 U.S.C. § 523(a)(2)(A).

To assert a claim under § 523(a)(2)(A), a party must first allege the existence of a debt; this, Plaintiff fails to do. A party must also allege: 1) *the defendant* made a false representation, or engaged in other materially deceptive conduct, with intent to deceive; 2) the party relied on the misrepresentation/deceptive conduct; 3) its reliance was reasonably justified under the circumstances; and 4) it sustained a loss as a result of the fraud/deception.¹³ Plaintiff alleges actions and misrepresentations by Defendant, but does not allege a sufficient connection between Defendant’s alleged actions and misrepresentations and the underlying harm for which Plaintiff seeks redress.

¹² *In re Cannon*, Case No. 12-10462-KKS, 2017 WL 3491804, at *3 (Bankr. N.D. Fla. Jun. 6, 2017).

¹³ *In re Roberts*, 17-30408-KKS, 2018 WL 6728412, at *5 (Bankr. N.D. Fla. Dec. 20, 2018).

Plaintiff has not alleged that the Defendant obtained any “money, property, services, or an extension, renewal, or refinancing of credit . . .” by false pretenses, a false representation or actual fraud.¹⁴ The allegations, as pled, are not enough to assert a plausible basis for relief under 11 U.S.C. § 523(a)(2)(A) against the Defendant.

Count II – Objection to dischargeability under 11 U.S.C. § 523(a)(4): fiduciary capacity.

In Count II, Plaintiff asserts that Defendant breached a fiduciary duty but provides no factual allegations to show how this alleged fiduciary duty arose. Although Plaintiff alleges that he signed a Power of Attorney in favor of Defendant, he does not reveal the language in such document, attach a copy to the Complaint, or explain how or why that document rendered Defendant a fiduciary of the sums collected by REMACC.

Additionally, to the extent that he seeks redress for actual fraud under 11 U.S.C. § 523(a)(4), Plaintiff has not met his burden to plead fraud with particularity.¹⁵

¹⁴ See 11 U.S.C. § 523(a)(2)(A) (2019).

¹⁵ “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s

Counts III and IV – Objection to dischargeability under 11 U.S.C. § 523(a)(4): embezzlement and larceny.

In Counts III and IV, Plaintiff merely rests on the allegations set forth in paragraphs 1 - 31 of the Complaint and does not allege elements of or facts that would support causes of action for embezzlement or larceny.

The elements required to prove embezzlement are: 1) entrustment 2) of property 3) of another 4) that is misappropriated.¹⁶ Plaintiff does not allege that he entrusted funds to Defendant, individually. To the extent that Plaintiff claims that is what he did, the attachments to the Complaint tend to show otherwise.

“Larceny is the taking of property without the owner’s consent, but without force or violence.... The major difference between embezzlement and larceny is that embezzled property is originally obtained in a lawful manner, while in larceny, the property is unlawfully obtained.”¹⁷ Plaintiff makes no allegation that Defendant obtained property or funds from him

mind may be alleged generally.” Fed. R. Civ. P. 9(b), made applicable by Fed. R. Bankr. P. 7009.

¹⁶ *Bryant v. Tilley (In re Tilley)*, 286 B.R. 782, 789 (Bankr. D. Colo. 2002).

¹⁷ *Tulsa Spine Hosp., LLC v. Tucker (In re Tucker)*, 346 B.R. 844, 852 (Bankr. E.D. Okla. 2006) (citing *United States v. Smith*, 156 F.3d 1046 (10th Cir. 1998) and *In re Tilley*, 286 B.R. 782, 789 (Bankr. D. Colo. 2002)).

unlawfully.

For the reasons stated, it is

ORDERED:

1. *Defendant's Motion to Dismiss Complaint to Determine Dischargeability of Debt, or in the Alternative Motion for More Definite Statement* (Doc. 17) is GRANTED.
2. Plaintiff shall have fourteen (14) days from the date of this Order within which to file an amended complaint.
3. The hearing currently scheduled for June 20, 2019 is CANCELLED.

DONE and ORDERED on June 18, 2019.



KAREN K. SPECIE
Chief U. S. Bankruptcy Judge

Defendant's attorney is directed to serve a copy of this Order on interested parties and to file a Proof of Service within three (3) days of entry of this Order.